

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TOMMIE E. UTTER)	
Claimant)	
VS.)	
)	
DUGAN CONSTRUCTION COMPANY)	Docket No. 1,009,466
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals the April 24, 2003 preliminary hearing Order of Administrative Law Judge Steven J. Howard. Claimant was denied benefits after the Administrative Law Judge determined claimant had failed to prove accidental injury arising out of and in the course of his employment on the date alleged.

ISSUES

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment on the date alleged?
- (2) Did claimant provide timely notice of accident? Respondent raised the issue of timely notice at the time of preliminary hearing, but the Administrative Law Judge, in denying claimant benefits based upon a lack of proof of accidental injury arising out of and in the course of employment, did not determine that issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board (Board) finds the Order of the Administrative Law Judge should be affirmed.

Claimant alleges accidental injury on January 10, 2003, while carrying a heavy saw across a plank. Claimant testified he fell, injuring his back and his right elbow. Claimant continued working for approximately one month after that incident. Claimant alleges he spoke both to his boss, Stephen Dugan, and to the boss's wife, Alison Dugan, of this alleged injury. Both Mr. and Mrs. Dugan testified at preliminary hearing and both denied any knowledge of any such accident. Mr. Dugan testified that had claimant provided him with notice of the accident, he would have immediately referred him to his workers' compensation carrier for medical care. Claimant had a history of prior problems at work, suffering an injury to his foot in September of 2002 for which medical treatment was provided through respondent's workers' compensation carrier.

It is also significant that claimant had prior back problems since he first began working for respondent. Respondent acknowledged that claimant would periodically comment on his back pain, but never advised it was in any way connected to a work-related accident with respondent. Claimant agreed that he did have a preexisting back problem, but alleges that the January 10, 2003 incident aggravated that condition.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.¹ This matter hinges almost entirely upon the credibility of the witnesses. All three witnesses—claimant and both Mr. and Mrs. Dugan—testified before the Administrative Law Judge at preliminary hearing. In denying claimant the benefits requested, the Administrative Law Judge apparently determined the Dugans more credible than claimant. The Board generally will give some deference to the determination by an administrative law judge regarding the credibility of the witnesses who testify before him or her. In this instance, the Board affirms the Administrative Law Judge's determination that claimant failed to prove accidental injury arising out of and in the course of his employment.

As the Administrative Law Judge did not reach the issue of notice, the Board will not consider that issue at this time.²

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the April 24, 2003 Order of Administrative Law Judge Steven J. Howard should be, and is hereby, affirmed.

IT IS SO ORDERED.

¹ See K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

² K.S.A. 44-555c(a).

Dated this ____ day of July 2003.

BOARD MEMBER

c: Michael J. Haight, Attorney for Claimant
Tracy M. Vetter, Attorney for Respondent
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Director